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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1997

DWIGHT DIXON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth District

PETITION FOR A WRIT OF CERTIORARI

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March 27, 1998

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11 pp

QUESTIONS PRESENTED FOR REVIEW

1. Cumulative errors at trial, failure to grant appellate relief, violate due process and equal protection clauses of the Fifth Amendment; a fundamentally fair trial; the Confrontation Clause of the Sixth Amendment.

a. Statements of indicted and unindicted co-conspirators were admitted in violation of *United States v. James*, 590 F.2d 575, et al., and Federal Rules of Evidence 801(d)(2)(E).

b. The testimony of confidential informant, Dennis Roberson, was admitted in violation of *United States v. James*, 590 F.2d 575, et al., and Federal Rules of Evidence 801(d)(2)(E).

c. Cross-Examination was denied when government witness, Myrtle Bennett claimed her Fifth Amendment priviledge and made prejudicial statements in the presence of the jury.

d. Government witness, Rhonda Simmons, violated the rule of sequestration, Federal Rules of Evidence, Rule 615, but was allowed to testify.

e. Peggy Dudley, Juror No. 12, was seated after informing the Court she believed "criminals have too many rights".

f. No limiting instruction was given regarding evidence that could only be considered against Knox and limiting the jury's consideration of evidence against Dixon.

QUESTIONS PRESENTED FOR REVIEW – Continued

g. Knox's conviction of conspiracy was vacated pursuant to *Rutledge v. United States*, 116 S.Ct. 1241, as a lesser included offense of the CCE Count. Dixon's conviction for conspiracy should have been vacated.

h. Dixon should receive a lower sentence because 2D1.1(b); 3.B1.2, U.S.S.G.; quantity of drugs calculated should not apply and Dixon should have received a reduction for acceptance of responsibility.

LIST OF PARTIES TO THE PROCEEDING

The petitioner, Dwight Dixon, was the defendant below and appellant in the Fifth Circuit Court of Appeals, along with co-defendant, Stanley Knox.

Respondent, United States of America, was the plaintiff below and appellee in the Fifth Circuit Court of Appeals.

Stanley Knox was indicted, tried, convicted, and appealed, along with Dwight Dixon, to the Fifth Circuit Court of Appeals. Ray Carroll, Cliff Stokes, Lee Garrett Graham, Dorothy Jean Johnson, Rhonda Simmons, Carolyn Gardner, Roland Colom, Kevin Harris were defendants in the indictment, but were not parties to the trial court or appeal and are not respondents in this Court.

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CITATION OF THE REPORTS OF OPINIONS IN THE CASE

The decision, from the appeal to the Fifth Circuit Court of Appeals, is published as *United States of America v. Dwight Dixon; Stanley Knox*, No. 96-60277 issued December 29, 1997. [APPENDIX A] Petitioner seeks review of this opinion.

STATEMENT OF THE BASIS FOR JURISDICTION

Dwight Dixon was indicted by a Grand Jury for the United States of America, Northern District of Mississippi, during the June 22, 1995 Grand Jury Session for direct violation of 21 U.S.C. § 846 (conspiracy to possess with intent to distribute cocaine base between 1991 and 1995). Dwight Dixon was found guilty of conspiracy and sentenced to serve a term of 240 months of imprisonment, three (3) years of supervised release, and $1,000.00 fine was imposed by the Court. The judgment of guilt and sentence of the court of the United States of America was entered on January 30, 1996. [APPENDIX B]

Dwight Dixon filed his appeal pursuant to Rule 40 F.R.A.P. in the Fifth Circuit Court of Appeals seeking relief from his conviction and sentence. The Fifth Circuit Court of Appeals affirmed his conviction and sentence on December 29, 1997. [APPENDIX A]

The jurisdiction of the United States Supreme Court is pursuant to Rule 40 F.R.A.P., authorizing discretionary review by this Court by *Writ of Certiorari.*

This Court has jurisdiction pursuant to Rule 13 of the United States Supreme Court Rules and the review of the judgment and sentence in question by writ of certiorari under the following statutes: a) 28 U.S.C. 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari; b) 28 U.S.C. 2105. Scope of review; abatement; c) 28 U.S.C. 2106. Determination.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are set forth verbatim in the Appendix.

The statutes and provisions involved are the Fifth and Sixth Amendments to the Constitution of the United States, U.S. Const., Amdt. 5 and 6.

STATEMENT OF THE CASE

On April 7, 1994, Dwight Dixon, a twenty-two (22) year old black male, together with Stanley Knox, Ray Carroll, Cliff Stokes, Lee Garrett Graham, Dorothy Jean Johnson, a/k/a "Dorothy Clemmer," Rhonda Simmons, Carolyn Garner, Roland Colom, Kevin Harris, was indicted in Count I of a twenty-three (23) count indictment for conspiracy to possess with intent to distribute cocaine base between 1991 and 1995. Only Dixon and Knox went to trial. The jury trial was held January 22, 1996 through January 31, 1996 and the jury returned a verdict of guilty. Dwight Dixon was sentenced to serve a term of 240 months of imprisonment, three (3) years of supervised release, and $1,000.00 fine was imposed by the Court.

A. Factual Predicates for Petitioner's Claims

Stanley Knox, a young black man, living in Blue Mountain, Tippah County, Mississippi, was alleged to be a "kingpin" in the distribution of cocaine in the Tippah County area. [T. Vol. 1, pp. 5-6] His operation allegedly was out of his home. [T. Vol. 2, p. 159] Many of his alleged participants or workers were in some way related to Stanley Knox and were in Knox's home, cars, or otherwise associated with Stanley Knox. [T. Vol. 2, pp. 236-237, 241, 255, 262, 383-385, 389, 404, 412-413, 449] Dwight Dixon is Stanley Knox's first cousin, so there were times when Dixon was in Stanley Knox's presence. [T. Vol. 2, p. 449] Dwight Dixon lived in an adjoining county, Union County, New Albany, Mississippi. [T. Vol. 5, pp. 1155-1157, 1165, 1169-1171]

B. The Proceedings Below

Dwight Dixon was represented at trial and on appeal by CJA Panel Attorney, Bobby T. Vance, 123 Van Voris Street, Post Office Box 307, Batesville, Mississippi 38606-0307. At trial, Dwight Dixon did not testify in his own defense. Numerous motions were filed. The most important motions were a Motion In Limine To Prohibit Introduction Of Other Crimes, Bad Character; Motion For Pretrial Determination of Admissibility of Co-Conspirator's Statements Pursuant To Rule 801(d)(2)(E) Federal Rules of Evidence; Motion To Suppress Evidence.

Post-trial motions, filed by Dixon, raised the following issues:

a. denying Joint Motion To Rule On Defendants', Stanley Knox and Dwight Dixon, Objection To Government's Notice of Maximum Sentence (Enhancement);

b. denying Motion To Reinstate Bond Pending Sentencing;

c. denying Motion For New Trial.

Preservation of Issues For Appeal:

In the beginning of the trial, Dixon objected to certain testimony. [T. Vol. 3, p. 634] The Court advised Dixon as follows:

> THE COURT: It is the same way for either party. If the objection is sustained to one party it is sustained to the other party, too.

[T. Vol. 3, p. 634]

This ruling was presented for the record in order to protect the record for appeal purposes. [T. Vol. 4, pp. 871, 872]

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. **CUMULATIVE ERRORS AT TRIAL, FAILURE TO GRANT APPELLATE RELIEF, VIOLATE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FIFTH AMENDMENT; A FUNDAMENTALLY FAIR TRIAL; THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT.**

A. **STATEMENTS OF INDICTED AND UNINDICTED CO-CONSPIRATORS WERE ADMITTED IN VIOLATION OF *UNITED STATES V. JAMES*, 590 F.2D 575, ET AL., AND FEDERAL RULES OF EVIDENCE 801(d)(2)(E).**

B. **GOVERNMENT WITNESS, RHONDA SIMMONS, VIOLATED THE RULE OF SEQUESTRATION, FEDERAL RULES OF EVIDENCE, RULE 615, BUT WAS ALLOWED TO TESTIFY.**

C. **THE TESTIMONY OF CONFIDENTIAL INFORMANT, DENNIS ROBERSON, WAS ADMITTED IN VIOLATION OF *UNITED STATES V. JAMES*, 590 F.2D 575, ET AL., AND FEDERAL RULES OF EVIDENCE 801(d)(2)(E).**

D. **CROSS-EXAMINATION WAS DENIED WHEN GOVERNMENT WITNESS, MYRTLE BENNETT CLAIMED HER FIFTH AMENDMENT PRIVILEDGE AND MADE PREJUDICIAL STATEMENTS IN THE PRESENCE OF THE JURY.**

E. **PEGGY DUDLEY, JUROR NO. 12, WAS SEATED AFTER INFORMING THE COURT SHE BELIEVED "CRIMINALS HAVE TOO MANY RIGHTS".**

F. **NO LIMITING INSTRUCTION WAS GIVEN REGARDING EVIDENCE THAT COULD ONLY BE CONSIDERED AGAINST KNOX AND LIMITING THE JURY'S CONSIDERATION OF EVIDENCE AGAINST DIXON.**

G. KNOX'S CONVICTION OF CONSPIRACY WAS VACATED PURSUANT TO *RUTLEDGE V. UNITED STATES*, 116 S.CT. 1241, AS A LESSER INCLUDED OFFENSE OF THE CCE COUNT. DIXON'S CONVICTION FOR CONSPIRACY SHOULD HAVE BEEN VACATED.

H. DIXON SHOULD RECEIVE A LOWER SENTENCE BECAUSE 2D1.1(b); 3.B1.2, U.S.S.G.; QUANTITY OF DRUGS CALCULATED SHOULD NOT APPLY AND DIXON SHOULD HAVE RECEIVED A REDUCTION FOR ACCEPTANCE OF RESPONSIBILITY.

Dwight Dixon did not receive a fundamentally fair trial. Dwight Dixon was found guilty because of the overwhelming amount of evidence presented against Stanley Knox in the Government's attempt to prove, not only the conspiracy count against Knox, but the continuing criminal enterprise (CCE) from 1992 to March 1995, in violation of 21 U.S.C. § 848 and eight counts of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. § 841, and two counts of using and carrying firearms in relation to drug trafficking, in violation of 18 U.S.C. § 924(c), and ten counts of using the telephone to facilitate the commission of a felony under 21 U.S.C. § 841, in violation of 21 U.S.C. § 843, and one count of attempted possession of cocaine, in violation of 21 U.S.C. §§ 841 and 846. Footnotes omitted. *United States v. Dixon*, No. 96-60277 (5th Cir. 1997)

The District Court denied certain instructions requested by Dixon and failed to give any limiting instruction either at trial or in final instructions regarding the overwhelming evidence attributed only to Stanley Knox. Several instructions given included both Dixon and Knox in the same instruction. The evidence and instructions confused the jury to the point that Dixon and Knox became inseparable ingredients in the whole mixture. The jurors were unable to understand what evidence they could consider in finding Dixon innocent or guilty because of the overwhelming testimony and evidence presented by the government in its attempt to prove the CCE and other counts against Stanley Knox. [SRJI 52-84]

In his appeal to the Fifth Circuit, Knox argued, "that his convictions for both participating in a drug conspiracy and engaging in a CCE violate the Double Jeopardy Clause of the Fifth Amendment." The Fifth Circuit Court of Appeals ruled as follows,

> . . . We review Knox's double jeopardy claim de novo. *See United States v. Fields*, 72 F.3d 1200, 1209 (5th Cir.), *cert. denied*, 117 S.Ct. 48 (1996)
>
> . . . Count one of the indictment charged Knox with participating in a drug conspiracy under 21 U.S.C. § 846 and alleged that the conspiracy existed from 1991 through 1995. Count two of the indictment charged Knox with engaging in a CCE under 21 U.S.C. § 848 and alleged that the CCE existed from 1992 through 1995. The jury convicted Knox on both counts, but the district court only imposed sentence on Knox for his CCE conviction.
>
> . . . As the government concedes, a conviction under both the conspiracy and the CCE statutes is unconstitutional where the alleged CCE is the same enterprise as the conspiracy. *See Rutledge v. United States*, 116 S.Ct. 1241, 1247 (1996); *Fields*, 72 F.3d at 1209-10. *Because we agree that the alleged CCE is the same enterprise as the conspiracy, this Court vacates Knox's conviction for drug conspiracy under count one of the indictment.*[1] [Emphasis Ours] See *Fields*, 72 F.3d at 1209-10 (vacating drug conspiracy conviction when defendant unconstitutionally convicted of both drug conspiracy and engaging in a CCE).

---

[1] Knox contends that his CCE conviction should also be vacated because evidence introduced to prove Knox's participation in the conspiracy was irrelevant to Knox's engagement in the CCE and was extremely prejudicial to Knox. This contention is absurd. Evidence relevant to proving Knox's participation in the conspiracy clearly is relevant to proving Knox's engagement in the CCE because the conspiracy, as a lesser included offense of the CCE, comprises the same enterprise as the CCE. *See United States v. Fields*, 72 F.3d 1200, 1209-10 (5th Cir.), *cert. denied*, 117 S.Ct. 48 (1996).

> . . . Despite vacating Knox's drug conspiracy conviction, it is not necessary to remand this case for resentencing. Where it is clear that the drug conspiracy conviction did not lead the district court to impose a harsher sentence on Knox for engaging in a CCE than it would have in the absence of the drug conspiracy conviction, there is no need to remand for resentencing. *See id.* at 1210. Here, Knox has not been sentenced for the conspiracy conviction. Clearly, the conspiracy conviction did not affect Knox's sentence for the CCE conviction.

United States v. Dixon, No. 96-60277 (5th Cir. 1997)

It is imperative to recognize that the only count in which Dixon was charged was the conspiracy count. Throughout the trial and even in the Fifth Circuit, Dixon and Knox have merged. They have not been separated, neither, by the trial court, the jury or the Fifth Circuit.

a. Statements of indicted and unindicted co-conspirators were admitted in violation of *United States v. James*, 590 F.2d 575, et al., and Federal Rules of Evidence 801(d)(2)(E).

At the trial of this case, the government's primary goal was to convict Stanley Knox. The government called, in its case-in-chief, forty-one (41) witnesses. Of the witnesses called by the government, four (4) were named in the Indictment. These were Lee Garrett Graham, Stanley Knox's half brother, Dorothy Jean Johnson, Rhonda Simmons, and Roland Colom.

The other government witnesses, who were not named in the indictment, but who testified about Dwight Dixon were Scott Phillip Riddle, Larry Cox, Diane Sanders Graham, Vanessa Easton Cowan, and Dennis Roberson. Many of these witnesses were identified through testimony as members of Knox's distribution scheme. *Agents Rod Waller and Tommy Corbin also testified but their testimony about Dixon was for the most part exculpatory.* [Emphasis Ours]

The government's other witnesses did not testify about Dwight Dixon. These witnesses were Melvin Knox, Carol Lee Hill, Mitchell Knox, Barry Cook, Virginia Crum, Wendy Adkins, Riley Bennett, Eddie Brent Mauney, Karen Hill, Eldridge Berry, Myrtle Bennett, James Rutherford, Arthur Spears, Eddie Barkley, David Wilson, and Henry Montes. Many of these witnesses were also identified through testimony as members of Knox's distribution scheme or were in some way associated with Knox. All of their testimony was directed toward Knox.

Brenda Varnado, Larry Grissom, Mike Edlemon, Agent Steve Ray, Teresa Hickmon, Ronnie Thomas, Eddie McCollough, Carol Able Karr, Wanda Henry, James Iwamoto, Edwina Ard, Sandra Crum, Chuck Smith, and Jeff Palmer testified in their official capacities as members of law enforcement or as members of the criminal justice system.

Of the forty-one (41) witnesses called by the government, only eleven (11) mentioned Dwight Dixon.

Pertinent testimony is set forth below:

A. Years – 1989, 1990, 1991 (Dwight Dixon was not indicted for conspiracy in the years 1989, 1990.)

Vanessa Easton Cowan testified she bought crack cocaine from Stanley Knox and began buying in the "late 80's, early 90's". [T. Vol. 4, p. 886] This was over objection of defense counsel that her testimony was outside the scope of the indictment and conspiracy. [T. Vol. 4, p. 985] Cowan was not indicted. She testified she stopped buying drugs from Stanley Knox in 1992. [T. Vol. 4, pp. 989, 990] When asked who worked for [Stanley Knox], Cowan named Mitchell [Knox], Larry [Cox], Ray [Carroll], Scott [Riddle] . . .

Then the government asked *again* and Cowan said " . . . [A]nd Dwight". [T. Vol. 4, p. 991]

On cross-examination, Cowan testified she could not remember or identify the person [Dwight] because it had been so long. [T. Vol. 4, pp. 1007-1009] This witness' testimony should have been excluded.

On the government's redirect, the witness testified that on two (2) or three (3) occasions she saw Dwight at Stanley Knox's house. [Emphasis Ours]. [T. Vol. 4, p. 1009]

B. Years – 1990, 1991, 1992 (Year of 1990 is outside the scope of conspiracy per indictment)

Mitchell Knox, Stanley Knox's third (3rd) cousin, testified he worked for Stanley Knox for four (4) years in 1990, 1991, 1992. [T. Vol. 2, p. 236] Mitchell Knox was not indicted. When questioned by the government about the people who were working for Stanley Knox. Mitchell Knox named himself, Larry [Cox], Cliff [Stokes], Ray Carroll, Barry Cook, Melvin Knox, Scott Riddle. [T. Vol. 2, 236-237] *There was no mention of Dixon.* [Emphasis Ours]

C. Year – 1992

Virginia Crum was Stanley Knox's girlfriend. She lived with Knox; they have children together. Crum testified she met Stanley Knox in 1992. [T. Vol. 2, p. 333] Crum was not indicted. When asked who made trips to Memphis to pick up drugs, she identified Larry Cox, Cliff Stokes, and Mitchell Knox. [T. Vol. 2, pp. 345-346] When asked who sold dope, she identified Mitchell [Knox], Larry [Cox], and Ray Carroll. [T. Vol. 2, p. 347] When asked who delivered, she identified Stanley Knox, Mitchell [Knox], and Larry [Cox]. [T. Vol. 2, p. 352] *There was no mention of Dixon.* [Emphasis Ours]

[Crum admitted she perjured herself in a letter sent to Stanley Knox signed "Virginia Crum" after the trial. Defendants filed a Joint Motion For JNOV Or In The Alternative, Motion For New Trial Based On Newly Discovered Evidence based on this letter. [R. 207] This motion was denied in error by the District Court.]

D. Years – 1992, 1993, 1994

Eldridge Berry testified he used crack cocaine for three (3) years and bought cocaine from Stanley Knox in 1992,

1993, 1994. [T. Vol. 4, p. 749] Berry was not indicted. *Berry never mentioned Dwight Dixon at all.* [Emphasis Ours]

Dorothy Jean "Climer" Johnson was indicted only in Count I, Conspiracy. She testified she was involved with Larry Cox and was selling drugs on her own in 1992, to somewhere in 1993 and 1994. [T. Vol. 4, p. 776] When asked who delivered, Dorothy Johnson identified Larry Cox, Cliff Stokes, Scott Riddle. [T. Vol. 4, p. 769] *Johnson never mentioned Dwight Dixon at all.* [Emphasis Ours]

E. Year – 1993

Larry Cox, Barry Cook's father, testified he worked for Stanley Knox for approximately one year in 1993. [T. Vol. 2, pp. 383-384] When asked by the government who was working for Stanley Knox, he identified himself, Mitchell Knox, and Cliff Stokes. [T. Vol. 2, p. 385] Others identified were Ray Carroll, Michael Hill, Barry Cook, Scott Riddle, Melvin Knox. [T. Vol. 2, p. 404] When asked about who made trips to Memphis, Cox identified himself, Stanley Knox, Cliff [Stokes], Mitch [Knox], Barry [Cook] and Lee Garrett. [T. Vol. 2, p. 389] Others identified were Lee Graham, and Lee Graham's wife, Diane. [T. Vol. 2, p. 412] When asked who went to Nashville, Cox named himself, Stanley Knox, Ray Carroll, Jabo Spike. [T. Vol. 2, pp. 412-413]

When Cox was asked:

Q. What about Dwight Dixon?

A. *He just hung down there* – [Emphasis Ours]

Q. All right. During the time you were –

A. – *working on cars and stuff.* [Emphasis Ours]

[T. Vol. 2, p. 449]

Melvin Knox, a first (1st) cousin of Stanley Knox, testified he sold drugs for Stanley Knox sometime in 1993 or later. [T. Vol. 2, p. 145] Melvin Knox was not indicted. When asked who was selling dope at Knox's house, he named himself, Mitch Knox, Larry Cox, Barry Cook, Scott Riddle, Cliff Stokes, Kevin Harris, and Jeffery Hill. [T. Vol. 2, pp. 106-169] When asked who was "making trips", Melvin Knox

named Mitchell Knox, Barry Cook, Lee Graham, and Lee Graham's wife, Diane. When asked who was making deliveries, Melvin Knox named Scott [Riddle], Mitch [Knox], and Jeff [Hill]. [T. Vol. 2, p. 184] *Melvin Knox did not mention Dwight Dixon at all.* [Emphasis Ours]

Arthur Spears testified he sold crack cocaine with Stanley Knox, starting in the vicinity of the year 1993. [T. Vol. 4, p. 926] He moved to Memphis, Tennessee in 1993 and started working with the government September 1, 1994. [T. Vol. 4, pp. 932-933] Arthur Spears was not indicted. When asked who was working at Stanley Knox's house, Spears named Michael Hill, Larry Cox, and Ray Carroll. *Spears did not mention Dwight Dixon.* [Emphasis Ours]

F. Years – 1993, 1994

Lee Garrett Graham is Stanley Knox's half-brother. Graham testified he worked for Stanley Knox in 1993 and into late summer of 1994. [T. Vol. 3, p. 572] When asked who made trips to Memphis, Graham identified himself, his wife [Diane Sanders Graham], Larry [Cox], Cliff Stokes. [T. Vol. 3, p. 574] *Graham did not mention Dwight Dixon at all.* [Emphasis Ours]

Diane Sanders Graham is the wife of Lee Garrett Graham and is Stanley Knox's sister-in-law. Diane Graham went with Lee Garrett Graham on trips to Memphis in 1993 and late summer of 1994. [T. Vol. 4, p. 572] Diane Graham was not indicted. When asked by the government who was working for Stan [Knox], she identified herself, her husband [Lee Garrett Graham], Larry Cox, Mitchell Knox, Cliff Stokes, Michael Hill. Then the government asked:

> Q. Do you recall any others offhand, off the top of your head?
>
> A. Dwight Dixon, I *think*. Yeah. [Emphasis Ours]

[T. Vol. 4, pp. 544-545]

She identified Dwight Dixon after the following question by the government:

Q. What about Dwight Dixon, do you see him in the courtroom today?

A. Yes, sir.

[T. Vol. 4, p. 555]

Scott Phillip Riddle testified he did yard work at Stanley Knox's home in Blue Mountain, Mississippi. He sold drugs for Stanley Knox in early 1993-1994 and began cooperating with DEA in 1994-1995. [T. Vol. 1, pp. 5-6] He was not indicted.

When Riddle was asked to name people who went with him on trips to Memphis, he said, "Dwight Dixon." [T. Vol. 1, pp. 15-16]

When questioned about a stop by the police, Riddle testified that Dwight Dixon was in the back seat of the car along with Riddle. [T. Vol. 1, pp. 17, 18]

When questioned about payment, Riddle testified:

Q. What about Dwight Dixon, was he on salary?

A. Yes.

[T. Vol. 1, p. 23] See also [T. Vol. 1, pp. 39, 81]

However, on cross-examination, when questioned about his testimony before the grand jury regarding trips he made, Riddle testified as follows:

Q. And nowhere in this transcript does it say that Dwight Dixon, the young man by the pretty woman in the yellow shirt, said that he ever went to Memphis and picked anything up, does it?

A. No.

[T. Vol. 1, pp. 104, 124]

Q. Did you ever mention Dwight Dixon concerning going to Memphis in regard to this matter? You didn't, did you?

A. No, sir.

Q. Now, according to your plea agreement you got to testify some more to get some more time knocked off, isn't that correct?

A. Yes, sir.

Q. And today you are doing that testimony and suddenly you are naming Dwight Dixon, isn't that correct?

A. No.

Q. You named him today, didn't you –

A. Yes, sir.

[T. Vol. 1, pp. 125-126]

Riddle also testified on cross that he was not there [at Stanley Knox's] in 1993; he was there in the Summer of 1994, but was not there in the Fall of 1994. [T. Vol. 1, pp. 110, 112-113]

b. Government witness, Rhonda Simmons, violated the rule of sequestration, Federal Rules of Evidence, Rule 615, but was allowed to testify.

Rhonda Simmons was in the courtroom when Larry Cox was testifying. Counsel for Dixon and Knox moved to exclude her testimony for violation of the "Rule of Sequestration". This motion was denied by the trial court. [T. Vol. 3, pp. 660, 661]

G. Years – 1993, 1994, 1995

Rhonda Simmons was indicted only for conspiracy. She testified she started working for Stanley Knox between 1993-1995. [T. Vol. 3, p. 626] When asked who delivered, the witness identified Larry Cox, Scott Riddle, Ray Carroll, Cliff Stokes, Barry Cook, Michael Hill.

Then the government prompted:

Q. Look around the courtroom and tell us if you see anyone in the courtroom that he had deliver to you besides those people.

A. Dwight.

[T. Vol. 3, pp. 631, 632]

When asked who else sold dope at Stanley Knox's house, Simmons named Mitchell Knox, Scott Riddle, Cliff Stokes, Larry Cox. [T. Vol. 3, p. 634]

On cross-examination, the witness testified:

Q. All right. Now, when the government was asking you about different runs of different deliveries –

A. Uhm-uhm.

Q. – to your house, you named a number of folks, is that correct?

A. Yes, sir.

Q. All right. Among those, Larry, Scott, Michael Hill, Ray Carroll, Cliff Stokes, and others, is that correct?

A. Yes.

Q. All right. Now, at that time you didn't name Dwight Dixon at all in that, did you?

A. No, sir.

Q. And it was only after prompting from the government that you named Dwight Dixon, isn't that correct?

A. Yes, sir.

Q. All right. Now, do you remember a particular day – can you give me a day and a date that Dwight Dixon delivered anything to you?

A. No, I can't, but I didn't remember because he only came a couple of times.

[T. Vol. 3, p. 657]

Roland Colom was also indicted only for conspiracy. Colom was Rhonda Simmons boyfriend and partner in her drug selling business. He testified he met Rhonda in 1991 and started dealing in dope in 1993. [T. Vol. 3, p. 693] When asked who delivered drugs to Rhonda and himself, Colom identified Larry Cox, Mitchell Knox, Scott Riddle and Cliff Stokes. [T. Vol. 3, p. 696] When asked who was selling at Knox's house, Colom named Larry Cox, Mitchell Knox, Cliff [Stokes]. [T. Vol. 3, p. 699] When asked:

Q. These people that came out of the house delivering drugs, do you see anyone else who is in the courtroom today who was among those people?

A. *I saw Dwight Dixon down there are few times.* [Emphasis Ours]

. . .

Q. You said you seen Dwight where a few times?

A. Down at Stan's house.

Q. Would – By the way, did Dwight – *did Dwight ever deliver to Rhonda while you were at the house?*

A. *Not that I recall.* [Emphasis Ours]

[T. Vol. 3, pp. 701-702]

James Rutherford testified he bought drugs from Stanley Knox in 1994 and in 1995. [T. Vol. 4, pp. 875-883] Rutherford began assisting law enforcement in January, 1995 [T. Vol. 4, p. 884] Rutherford was not indicted. When asked by the government who was at Stanley Knox's house that he dealt with, Rutherford named Stanley Knox, Michael Hill, Scott Riddle, Mitchell Knox, Larry Cox. Then the government prompted:

Q. Look around the courtroom and tell us if there is anyone else in here that you dealt with down there?

Defense counsel's objection was overruled and Rutherford testified, "Dwight." [T. Vol. 4, p. 879]

H. Year – 1994

Barry Cook testified he sold drugs for Stanley Knox in 1994 for approximately seven (7) or eight (8) months. [T. Vol. 2, pp. 289-290] Cook was not indicted. When asked by the government:

Q. All right. During this seven, eighth month – eight month period of time that you were working for Stan [Stanley] Knox – Oh, let me ask you this – all right. During that period – During that period of time, who was working – who else was working at the house, and *I don't mean doing odd jobs, I am talking about selling and delivering?* [Emphasis Ours]

A. Me, Cliff Stokes, Scott Riddle, Melvin Knox, Mitchell Knox, Larry Cox, Cliff Stokes (sic).

[T. Vol. 2, pp. 293-294]

When asked who made trips to Memphis to buy dope, Barry Cook testified, "Stan [Stanley Knox] . . . Cliff [Stokes], Larry [Cox], Mitch [Mitchell Knox] *and that's all.*" [Emphasis Ours] [T. Vol. 2, p. 299] *Dwight Dixon was not mentioned by this witness.* [Emphasis Ours]

I. Year – 1995

Wendy Adkins testified that she sold drugs for Stanley Knox through Cassandra Rogan, who has children by Stanley Knox, in January of 1995. Adkins was arrested May 7, 1995. [T. Vol. 3, pp. 517-518] On cross-examination, she was asked who delivered and she identified Cliff Stokes, Michael Hill and Larry Cox as the only people she knew. [T. Vol. 3, p. 531]

J. Year – ?

Wanda Henry testified that she bought drugs from Stanley Knox and Ray Carroll. [T. Vol. 5, p. 1184] No time frame was given.

The Fifth Circuit wrote, "The case also teems with evidence showing that Dixon knew of and voluntarily participated in the conspiracy . . . This evidence is sufficient to support Dixon's conspiracy conviction." *United States of America v. Dwight Dixon; Stanley Knox*, 96-60277 (5th Cir. 1997)

Dixon filed a pre-trial motion requesting a determination of admissibility of co-conspirators' statements prior to trial. [SRMH 3] The Court did not rule pre-trial and elected to determine admissibility at trial as the evidence was presented. [SRMH 3, 4]

At trial, the government, at the close of its case-in-chief, moved for a ruling "by the Court to make the *James* determination with regard to the admissibility of co-conspirator hearsay." [T. Vol. 6, p. 1331]

The Court ruled, "Well, I think the implication has been made already . . . it will be expressly made." [T. Vol. 6, p. 1332]

Dixon also renewed his *James* motion and moved for directed verdict by pointing out specifically that the government failed to meet its burden of proof. The Court ruled, "All right. Taking all of this evidence together, it appears to the Court, and in the light of most favorable to the government at this point, there is a question for the jury to decide. The motion for directed verdict is denied." [T. Vol. 6, pp. 1339-1342]

To be admissible, the statements must be offered against a party, must be offered by a co-conspirator, and *must be made in furtherance of the conspiracy*. Federal Rules of Evidence 801(d)(2)(E), (emphasis added). Consistent with the evidentiary rule, the decision in *United States v. James*, 590 F.2d 5758, 583 (5th Cir. 1979), cert. denied, for 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed. 2nd 283 (1979) sets out the minimum standards for admissibility of co-conspirators' statements in this circuit. See also *Krulewitch v. United States*, 336 U.S. 440 (1949), *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986), and *United States v. McConnell*, 988 F.2d 530 (5th Cir. 1993).

In no way did the government meet the test of *James*, *supra*, regarding the testimony of Dennis Roberson. The prosecution failed to prove, even by the preponderance of the evidence standard, that under *James*, the prosecution must show (1) "that a conspiracy existed, (2) that the co-conspirator and the defendant against whom the co-conspirator's statement is offered are members of the conspiracy; and (3) that the statement was made during the course and in furtherance of the conspiracy." *United States v. James*, 590 F.2d at 582.

The prosecution must prove these factors by a preponderance of the evidence. *James*, 590 F.2d at 582. Under *Rutledge v. United States*, 116 S.Ct. 1241 (1996), the conspiracy charge was a lesser included offense of conducting a continuing enterprise.

In *Lee v. Illinois*, 476 U.S. 530 (1986), this Court said:

> Our cases recognize that this truthfinding function of the Confrontation Clause is uniquely threatened

when an accomplice's confession is sought to be introduced against a criminal defendant without the benefit of cross-examination. As has been noted, such a confession "is hearsay, subject to all the dangers of inaccuracy which characterize hearsay generally. . . . More than this, however, the arrest statements of a co-defendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Bruton v. United States*, 391 U.S. at 141 (WHITE, J., dissenting) (citations omitted) (*see also Dutton v. Evans*, 400 U.S. 74, 98 (1970) (concurring in judgment).

B

Illinois contends that Thomas' statement bears sufficient "indicia of reliability" to rebut the presumption of unreliability that attaches to codefendants' confessions, citing as support our decision in *Ohio v. Roberts*, 448 U.S., at 66 (citations omitted). While we agree that the presumption may be rebutted, we are not persuaded that it has been in this case.

In *Roberts*, we recognized that even if certain hearsay[2] evidence does not fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation

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[2] We have previously turned to McCormick's definition of hearsay as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." E. Cleary, McCormick on Evidence 246, p. 584 (2d ed. 1972). We have also quoted approvingly McCormick's caveat that "[s]implification has a measure of falsification." Ibid. (quoted in *Ohio v. Roberts*, 448 U.S., at 62, n.4).

> Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." Ibid. However, we also emphasized that "[r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.' " *Id.*, at 65, quoting *Snyder v. Massachusetts*, 291 U.S. 97, 107 (1934). Illinois' asserted grounds for holding Thomas' statement to be reliable with respect to Lee's culpability simply do not meet this standard. [Footnote omitted].

Lee v. Illinois, 476 U.S. 530, 542-545.

The problem of reliability of the co-defendant's testimony is exacerbated when the witness is testifying pursuant to a plea agreement. This exacerbation stems from the fact that invariably the witness is hoping or is seeking either a 5K1.1 Motion or a Rule 35 Motion to reduce their own sentence. In a concurring opinion, in *New Mexico v. Earnest*, 477 U.S. 648 (1986), Chief Justice Rehnquist wrote,

> [*Footnote* *] For example, in a case in which the State claims that a codefendant's confession is admissible because it is "interlocks" with the defendant's confession, *Lee v. Illinois* sets out the following test: "If those portions of the codefendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted." 476 U.S., at 545.

New Mexico v. Earnest, 477 U.S. 648, 651 (1986)

In the case of Dwight Dixon, Dwight Dixon gave no confession, did not testify at trial, no limiting instruction was

given by the Court. Most importantly, the Court did not follow *Bourjaily v. United States*, 438 U.S. 171 (1987) and the pre-admission requirements of Federal Rule of Evidence 801(d)(2)(E) as set out in *United States v. James*, 590 F.2d 575 (1979), *United States v. Fraoso*, 978 F.2d 896 (5th Cir. 1992). The reason this aspect is so important is the only evidence against Dixon was co-conspirator statements, except for the testimony of Agent Rod Waller who called in a tag number and the tag number came back in Dixon's name and a beeper which was charged on the account of Stanley Knox. Even Agent Corbin testified that he was relying "upon what Dennis Roberson told him." [T. Vol. 5, p. 1153]

Trial procedure used to allow into evidence co-conspirators statements violates the Confrontation Clause of the Sixth Amendment. The testimony of these co-conspirators denied Dixon due process and a fundamentally fair trial.

c. The testimony of confidential informant, Dennis Roberson, was admitted in violation of *United States v. James*, 590 F.2d 575, et al., and Federal Rules of Evidence 801(d)(2)(E).

Over objection, the government called Dennis Roberson, a confidential informant cooperating with Agent Tommy Corbin of the North Mississippi Narcotics Unit, Canine Unit in Tupelo, Mississippi. The government alleged that the purpose of this testimony was to prove an act in the course of the conspiracy and to document Dwight Dixon's "role and participation in the conspiracy, which compared to Stanley Knox so far has been very much lower than Stanley Knox. So that is why this type of evidence is important to the co-conspirator." [T. Vol. 5, pp. 1115-1116] Roberson testified about an investigation which took place in Pontotoc, Mississippi, on March 29, 1994. [T. Vol. 5, p. 1110] Roberson made a hand to hand buy from Marcus Cutler, but Officer Corbin did not obtain a warrant and because he was not aware of any other investigation including any investigation of Stanley Knox and Dwight Dixon. The substance purchased by the confidential informant was destroyed. Further, in a pre-trial motion to suppress, the

District Court granted Defendant Dixon's suppression motion as to the destroyed substance. [T. Vol. 5, pp. 1110-1124]

In addition, the case agent supervising Roberson, Agent Tommy Corbin, testified in direct contravention of Roberson's testimony. [T. Vol. 5, pp. 1145-1154] Roberson testified that the purpose of his meeting with Agent Corbin was to conduct an investigation on Dwight Dixon. [T. Vol. 5, p. 1125] He also testified that he entered the home of "Dwight". [T. Vol. 5, p. 1125] On cross-examination, Agent Corbin testified that he didn't tell Roberson Dwight Dixon was in the apartment because "we didn't know who was in there." [T. Vol. 5, p. 1150] In fact, Agent Corbin testified that he did not tell Roberson "anything" about who was in the apartment. He also testified there were four (4) people in the apartment. [T. Vol. 5, p. 1151] Agent Corbin also testified that his testimony was based upon what Dennis Roberson told him. He also said that he had never used Roberson as a confidential informant before and has not used him since. [T. Vol. 5, p. 1153] Roberson testified, "[a] guy named Marcus, Dwight's girlfriend, Aletha, another black male that he didn't know and Dwight were in the apartment." [T. Vol. 5, p. 1128] He also testified that even though Marcus went to get the drugs outside, that the buy was from Dwight. [T. Vol. 5, p. 1129] Agent Corbin testified that he was going to use the buy to "get probable cause to run a search warrant" inside the location, but based on the evidence that came from the outside, "we felt like, at that time, there was no evidence held inside the apartment so we did not run a search warrant." [T. Vol. 5, p. 1149] Agent Corbin testified that the purpose of the investigation was to make a controlled buy "from an apartment at the Pontotoc Apartments, black male. At that time, we didn't know who was in the apartment." [T. Vol. 5, p. 1145] He further testified that he did not know the identity of the man who "came out . . . go behind the bush and garbage cans . . . bent down, stood back up and went back up stairs." He later learned, according to his testimony, that the black male was Marcus Cutler. [T. Vol. 5, p. 1146] He also testified that the purpose of the buy was to "get enough probable cause to run a search warrant." [T. Vol. 5, pp. 1148-1149] The District

Court did not make a finding that the Pontotoc buy was in furtherance of the conspiracy/conspiracies charged in the Indictment, in fact the District Court ruled "whether or not it had anything to do with this conspiracy is a question of fact to be determined by the trier of fact. [T. Vol. 5, p. 1123] Even though the witness testified, it is apparent from the testimony of the surveillance officer that the witness' credibility is a major issue. Agent Tommy Corbin testified in direct contravention of the testimony of confidential informant, Dennis Roberson.

Further, the District Court admitted into evidence a tape that was recorded at the time Roberson made the buy from Marcus Cutler. The tape consisted primarily of a noise, which Roberson identified as someone playing Super Nintendo Game. [T. Vol. 5, p. 1133] Agent Corbin also testified that he listened to the tape and that it was difficult to understand because of the Nintendo Game recorded in the background. [T. Vol. 5, p. 1152] The prosecution failed to prove that the statements made on the audio tape were in furtherance of any alleged conspiracy, and therefore, the tape should have been excluded from evidence as hearsay. The tape in question was not used in furtherance of a conspiracy in any shape, form, or fashion. Mere conversation is not admissible under the co-conspirator statements exception. *United States v. James*, 590 F.2d 575, 579 (5th Cir. 1979).

The tape revealed no information about any plans for any future drug deals, any discussion of any alleged current drug transactions, nor any discussion of any alleged past drug deals. This tape contained absolutely no information which could have aided a conspiracy with the supposed objective the trafficking narcotics of Stanley Knox and Dwight Dixon.

Furthermore, Roberson's testimony should have been inadmissible because the government failed to disclose the identity of the confidential informant until he was called to the witness stand. Pursuant to *Roveria v. United States*, 353 U.S. 53 (1957), *United States v. Sanchez*, 908 F.2d 1443, and the Federal Rules of Criminal Procedure 12(b)(1), when an informant is involved in the purchase itself, the confidential

informant privilege does not apply. Dixon requested discovery, pursuant to Federal Rules of Criminal Procedure and Local Rule 16.

Defendant alleges that pursuant to *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), he is entitled to this disclosure and his defense and his constitutional right to confront witnesses was prejudiced by the government withholding of the identity.

Second, Defendant alleges under pre-trial discovery *Brady v. Maryland*, 373 U.S. 83 (1963) and/or *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), he was prejudiced in that he was prevented from pursuing information on this key witness informant which may have led to information which would have impeached his credibility.

In *Krulewitch v. United States*, 336 U.S. 440 (1949), the United States Supreme Court held that in order to be admissible, the co-conspirator statements must be made in furtherance of the conspiracy. Similarly in *United States v. Mouzin*, the court held that unless the statements were made in an effort to further the objectives of the conspiracy, they should be held inadmissible as "garden variety" hearsay. *United States v. Mouzin*, 785 F.2d 682 (9th Cir. 1986). *See e.g. United States v. Guerro*, 693 F.2d 10 (1st Cir. 1982) (holding co-conspirators' statements must be used in furtherance of crime to be admissible). The Fifth Circuit has also adopted this same position on admissibility of statements in a very recent case, *United States v. McConnell*, 988 F.2d 530 (5th Cir. 1993). In *McConnell*, the court used a similar test to those mentioned above and determined that information was only admissible if it was used in furtherance of a conspiracy. *McConnell*, 988 F.2d at 533. See also *United States v. James*, 590 F.2d 575 (5th Cir. 1979) (holding that the statements must be made in furtherance of the conspiracy).

The courts have all been very clear and consistent with their rulings as to the admissibility of these co-conspirator statements. The substance of the tape was supposed to bolster or corroborate the testimony of Dennis Roberson. The information exchanged was very similar to the statements in *United States v. Rivera*, where the court held that mere status

reports on people did not facilitate the sale of narcotics nor could it further a conspiracy, therefore statements were inadmissible. *United States v. Rivera*, 775 F.2d 1559, 1562 (11th Cir. 1985). Likewise, in the case of *United States v. Gonzalez*, the court held that giving information to another about a co-conspirator being arrested does not facilitate a conspiracy and therefore, does not satisfy the requirements in 801(d)(2)(E). *United States v. Gonzalez*, 966 F.2d 918 (5th Cir. 1992).

In the case at bar, the District Court did not make a finding that the tape was in furtherance of the conspiracy/conspiracies charged in the Indictment. In *Krulewitch v. United States*, the Court held it to be reversible error to admit statements which did not fully comply with the three guidelines set up on 801(d)(2)(E). *Krulewitch v. United States*, 336 U.S. 440 (1949). Without meeting the requirements set out in 801(d)(2)(E), the statements were "garden variety" hearsay and as such inadmissible.

Additionally, according to Federal Rules of Evidence 402, "evidence may be excluded if its probative value is substantially outweighed by the danger of *unfair prejudice, confusion of the issues, or misleading the jury*, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Federal Rules of Evidence 403 (emphasis added). It is very clear in this case that the tape was unfairly prejudicial. Allowing the jury to hear this tape made it impossible for Dixon to receive a fair trial. This tape was for all purposes inadmissible and allowing it into evidence was an abuse of discretion on the part of the trial judge.

The Sixth Amendment has been construed as allowing admission into evidence, out-of-court statements of co-defendants, so long as it falls within a recognized exception to Rule 802. *See Idaho v. Wright*, 497 U.S. 805, 814, 815 (1990). Roberson was not a co-conspirator, either indicted or unindicted, nor was he a co-defendant. Roberson was a confidential informant who had never been used before by the police officer. There was absolutely no evidence presented that Roberson was in anyway connected to Knox, Dixon or any other co-defendants. Therefore, Roberson's testimony

does not fall within the co-conspirator exception to the hearsay rule and does not have the indicia of reliability required by the Sixth Amendment.

It appears the appellate court, like the trial court, did not separate the defendants. At page three (3), the Court writes, "The agents and informers made numerous *controlled* buys directly from either Knox, Dixon or other members of Knox's organization." . . . [Emphasis Ours]

The Fifth Circuit also held, "Whether Dixon's sale of drugs to Roberson was an act in furtherance of the conspiracy charged in the indictment, rather than an independent drug sale, is a question of fact for the jury." Citation omitted. Dixon was never charged with any sale, possession, or anything other than conspiracy.

d. Cross-examination was denied when government witness, Myrtle Bennett claimed her Fifth Amendment priviledge and made prejudicial statements in the presence of the jury.

Government witness invocation of Fifth Amendment privilege violates Sixth Amendment right to confront witnesses.

Dixon was entitled to a mistrial when the government called Myrtle Bennett to the stand and she claimed the Fifth Amendment after the government had met with her the night before and knew she was reluctant to testify.

The government called Myrtle Bennett to testify on the fourth day of trial. As the government began direct examination, Ms. Bennett pled the Fifth Amendment stating, "I plead the Fifth to protect myself and my family." [T. Vol. 4, p. 791] Counsel for the government repeated her answers that "you are not willing to testify about assisting the agents and stated you are doing it to protect yourself and your family" in the presence of the jury. [T. Vol. 4, p. 791] Counsel objected and asked to approach the bench. At the bench conference, counsel for the government revealed that he "understood yesterday that she was refusing to testify but that she would tell the

truth." [T. Vol. 4, p. 793] Counsel moved for a mistrial, which was denied. [T. Vol. 4, p. 793]

Dixon would show that this action by Ms. Bennett totally tainted this jury and prevented Dixon from receiving a fair trial. First of all, it is not clear that she had a right to claim the Fifth Amendment because she was allegedly cooperating with law enforcement. Secondly, the statements that she made were so prejudicial to Dixon it was impossible to cure and merited a mistrial. Dixon was denied any cross-examination of Bennett regarding the statement made in the presence of the jury.

Dixon was further prejudiced because Special Agent Waller was allowed to testify over objection to what Ms. Bennett said and did. [T. Vol. 4, pp. 804, 805, 808] Counsel continued to raise the objections and the Court finally held that Bennett was unavailable under Rule 804(a)(1) of the Federal Rules of Evidence but did not state on exception under 804(b) of the Federal Rules of Evidence [T. Vol. 4, p. 814] The Court also granted a continuing objection to this entire line of questioning. [T. Vol. 4, p. 815]

At page eight (8) of its opinion, the Fifth Circuit wrote, "Both Knox and Dixon contend that the district court abused its discretion in admitting tape recordings made of telephone calls between *Knox and Myrtle Bennett* . . . " The Fifth Circuit said, " . . . Knox's recorded statements are not hearsay because they constitute party admissions under Federal Rules of Evidence 801(d)(2)(A)." (citations omitted). This may be correct as to Knox, but this is error as to Dixon. Dixon was not a party to this taped conversation. In addition, as to Dixon, the statements are hearsay within hearsay because they were admitted through the testimony of a government agent who heard the statements of Knox and Bennett.

This Court said in *Douglas v. Alabama*, 380 U.S. 415 (1965):

> . . . we reversed a conviction because a confession purportedly made by the defendant's accomplice was read to the jury by the prosecutor. Because the accomplice in that case, while called to the witness

> stand, invoked his privilege against self-incrimination and refused to answer questions put to him, we held that the defendant's "inability to cross-examine [the accomplice] as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." *Id.*, at 419. This holding, on which the Court was unanimously agreed, was premised on the basic understanding that when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect and must be subjected to the scrutiny of cross-examination.

This error, combined with questioning by the government of witnesses regarding firearms, made it clearly impossible to leave the jury with any other impression other than Ms. Bennett was afraid for herself and her family to testify against Dixon for fear that Dixon would harm them. This clearly prevented Dixon from receiving fair and impartial consideration from this jury in weighing only the evidence attributable to him. This is another example of evidence directed toward Knox, which confused and prejudiced the jury in its deliberations of Dixon.

The right of confrontation and cross-examination provided for in the Sixth Amendment extends to and includes the right to fully cross-examine a witness on every material point relating to the issue to be determined that would have a bearing on the creditability of the witness and the weight and worth of his testimony. Dwight Dixon was denied any right of confrontation or cross-examination of the witness, Myrtle Bennett.

e. Peggy Dudley, Juror No. 12, was seated after informing the Court she believed "criminals have too many rights".

During voir dire, Juror Peggy Dudley and Juror Ronald Laverne Browning indicated that they believe that criminal defendants have too many rights. The Court denied Dixon's challenges to these jurors. [T. 31 vol. 7]

f. No limiting instruction was given regarding evidence that could only be considered against Knox and limiting the jury's consideration of evidence against Dixon.

Some of the counts against Knox were dismissed at trial, but the dismissal was after the Government had presented evidence against Knox. Again, the Court did not instruct the jury to disregard any evidence on these counts as to Dixon.

g. Knox's conviction of conspiracy was vacated pursuant to *Rutledge v. United States*, 116 S.Ct. 1241, as a lesser included offense of the CCE Count. Dixon's conviction for conspiracy should have been vacated.

In light of the holding in *Rutledge v. United States*, 116 S.Ct. 1241, 1247 (1996) and *United States v. Fields*, 72 F.3d at 1209-10, Dixon is so prejudiced by the evidence against Knox that even if the trial court had given a limiting instructing the jury would have been unable to separate Dixon and Knox.

h. Dixon should receive a lower sentence because 2D1.1(b); 3.B1.2, U.S.S.G.; quantity of drugs calculated should not apply and Dixon should have received a reduction for acceptance of responsibility.

There was no evidence that Dwight Dixon's actions were extensive. The role of other indicted and un-indicted co-conspirators including those testifying under plea agreements were substantially larger than the role of Dwight Dixon and therefore his culpability with respect to the average participant in this scheme was substantially less. See, *United States v. Brown*, 29 F.3d 953 (5th Cir. 1994)) in which the Defendant was given a decrease as a minor participant. See also, *United States v. Zuniga*, 18 F.3d 1254 (5th Cir. 1994) "defendant has burden of proof of minor role by preponderance of the evidence.")

At sentencing, the Court said Dixon had been convicted of conspiracy . . . he plead not guilty, he did not testify, and denied being a part of the conspiracy, so "how can I decide a rule that he is a minimal participant?" [MRSH, pp. 17-18]

Defendant Dwight Dixon objected to Paragraph 10 and Paragraph 15 of the Pre-Sentence Report with regard to calculation of the alleged amount of drugs in that the testimony did not indicate any amount of drugs attributed to Dwight Dixon, and further objected to a calculation based upon "crack" as opposed to powder since testimony indicated the purchase of powder as well as crack. The quantity of drugs attributed to Dwight Dixon "were not reasonably foreseeable." There is no evidence of any drug amount obtained from Dwight Dixon. See, *United States v. Carreon*, 11 F.3d 1225, appealed after remand 21 F.3d 1107 (5th Cir. 1994) *United States v. Dean*, No. 94-10045, 1995 WL 431014 (5th Cir. July 21, 1995), *United States v. Thomas*, 12 F.3d 1350 (5th Cir. 1994). [See SRSH 18]

No testimony at trial either on direct or cross attributed any ownership, possession or use of a dangerous weapon or gun to Dwight Dixon nor was there any foreseeability of any dangerous weapon on the part of Dwight Dixon. There was no evidence that any firearm was ever accessible to Dwight Dixon nor was it ever displayed in his presence. There is no evidence that Dwight Dixon ever had access to any firearm. The evidence and testimony regarding guns as applied to Dwight Dixon should not even be considered relevant conduct. See, *United States v. Brown*, 985 F.2d 766 (5th Cir. 1993). Guns owned by codefendant were in his house and not clearly associated with the drug activity attributed to Dixon. *United States v. Cochran*, 14 F.3d 1128 (6th Cir. 1994). Mere presence plus association with illegal possessors is not enough to establish possession. *United States v. Matthews*, 5 F.3d 1161 (8th Cir. 1993), appeal after remand 29 F.3d 462 (8th Cir. 1993). Government failed to establish connection between the offense and the gun. *Bailey v. United States*, 116 S.Ct. 501, 133 L.Ed.2d 472 (1995), Dwight Dixon in no way "used" a gun. [SRSH 18-19]

CONCLUSION

One raindrop does not cause erosion. Two or three raindrops do not cause erosion, but raindrops become torrents that do cause erosion. We do not know how many raindrops it takes before the erosion begins. The Fifth and Sixth Amendments of the United States Constitution are the clay which protect the innocent. If this clay is eroded, where does it begin and where does it end? Is it with the denial of a pre-trial motion? Is it the failure to give a limiting instruction? Is it prejudicial statements by a government witness made in front of the jury? Is it the reliability and credibility of witnesses testifying under plea agreements? Is it a combination of all the above? This Court is the dike that controls the flow. Certiorari should be granted to preserve the appellate process and the integrity of the United States Constitution.

For the foregoing reasons and authorities, this Court should issue a *Writ of Certiorari*.

Respectfully submitted,

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March 27, 1998

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60277

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
VERSUS
DWIGHT DIXON; STANLEY KNOX,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Mississippi

Before MAGILL,* SMITH and DeMOSS, Circuit Judges.

MAGILL, Circuit Judge:

Appellants Stanley Knox and Dwight Dixon were convicted of various federal offenses related to their participation in a drug trafficking conspiracy. Appellants appeal their convictions and sentences, raising a torrent of legal challenges. We vacate Knox's conviction for conspiracy and affirm the district court in all other respects.

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* Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

I.

Between 1992 and 1995, appellant Stanley Knox operated a large cocaine distribution organization in Tippah County, Mississippi. Knox's organization consisted of over nine members who worked under Knox's direction to obtain, transport, and distribute crack and powder cocaine. Knox used his own residence as the distribution center and headquarters for the organization. Knox employed several dealers, including appellant Dwight Dixon, to sell crack cocaine from Knox's house and to deliver crack cocaine to customers at other locations. Knox and his dealers sold crack cocaine twenty-four hours per day, seven days per week.

Knox arranged, participated in, and directed several trips to pick up cocaine from Memphis and Nashville, Tennessee, for distribution in Tippah County. These trips were taken several times per week, and sometimes every other day, and Knox's organization garnered between two and three ounces of cocaine on each trip. If Knox or his runners obtained powder cocaine on a trip, then Knox would supervise cooking the powder cocaine into crack cocaine for future sale. Knox, himself, made at least four trips to Nashville and picked up between six and nine ounces of cocaine on each trip. Dixon made at least one trip with Knox to Memphis to pick up two ounces of cocaine. In July 1994 two of Knox's runners, Mitchell Knox (Mitchell) and Harry Cook, were arrested while returning from Memphis after obtaining three ounces of cocaine for Knox. At the time, Cook and Mitchell were driving Knox's white Mercedes, which displayed a license plate for a different vehicle registered to Dixon.

Local, state, and federal authorities investigated Knox's and Dixon's activities by using undercover agents and informers. The agents and informers made numerous controlled drug buys directly from either Knox, Dixon, or other members of Knox's organization. Most of the controlled drug buys were performed at Knox's house, although some were performed at other locations in accordance with Knox's directions.

On June 22, 1995, a grand jury issued a twenty-three count indictment against ten defendants for various drug and firearm violations. Dixon was charged with one count of conspiracy to possess with intent to distribute cocaine base between 1991 and 1995, in violation of 21 U.S.C. § 846. Knox, in addition to being charged with the conspiracy count, was charged with one count of unlawfully engaging in a continuing criminal enterprise (CCE) from 1992 to March 1995, in violation of 21 U.S.C. § 848. Knox also was charged with eight counts of possessing with intent to distribute cocaine base, in violation of 21 U.S.C. § 841,[1] two counts of using and carrying firearms in relation to drug trafficking, in violation of 18 U.S.C. § 924(c),[2] ten counts of using the telephone to facilitate the commission of a felony under 21 U.S.C. § 841, in violation of 21 U.S.C. § 843,[3] and one count of attempted possession of cocaine, in violation of 21 U.S.C. §§ 841 and 846.

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[1] The government dismissed three of these counts during trial.

[2] The government dismissed these counts during trial.

[3] The government dismissed one of these counts during trial.

After Knox and Dixon's indicted codefendants entered plea bargains with the government, the government proceeded to trial against Knox and Dixon. The government dismissed several counts against Knox during trial, and the jury ultimately returned verdicts of guilty against both Knox and Dixon on all remaining counts. The district court sentenced Knox to life imprisonment[4] and sentenced Dixon to 240 months imprisonment. Knox and Dixon raise numerous issues on appeal concerning both their convictions and their sentences.

II. DOUBLE JEOPARDY

Knox contends that his convictions for both participating in a drug conspiracy and engaging in a CCE violate the Double Jeopardy Clause of the Fifth Amendment. We review Knox's double jeopardy claim de novo. *See United States v. Fields*, 72 F.3d 1200, 1209 (5th Cir.), *cert. denied*, 117 S.Ct. 48 (1996).

Count one of the indictment charged Knox with participating in a drug conspiracy under 21 U.S.C. § 846 and alleged that the conspiracy existed from 1991 through 1995. Count two of the indictment charged Knox with engaging in a CCE under 21 U.S.C. § 648 and alleged that

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[4] Knox was sentenced to life imprisonment on the CCE count, and he received concurrent sentences of various terms on his remaining convictions. The district court initially also sentenced Knox to a concurrent 240-month sentence for the conspiracy count, but specifically rescinded the sentence because the conspiracy was a lesser included offense of the CCE.

the CCE existed from 1992 through 1995. The jury convicted Knox on both counts, but the district court only imposed sentence on Knox for his CCE conviction.

As the government concedes, a conviction under both the conspiracy and the CCE statutes is unconstitutional where the alleged CCE is the same enterprise as the conspiracy. *See Rutledge v. United States*, 116 S.Ct. 1241, 1247 (1996); *Fields*, 72 F.3d at 1209-10. Because we agree that the alleged CCE is the same enterprise as the conspiracy, this Court vacates Knox's conviction for drug conspiracy under count one of the indictment.[5] *See Fields*, 72 F.3d at 1209-10 (vacating drug conspiracy conviction when defendant unconstitutionally convicted of both drug conspiracy and engaging in a CCE).

Despite vacating Knox's drug conspiracy conviction, it is not necessary to remand this case for resentencing. Where it is clear that the drug conspiracy conviction did not lead the district court to impose a harsher sentence on Knox for engaging in a CCE than it would have in the absence of the drug conspiracy conviction, there is no need to remand for resentencing. *See id.* at 1210. Here, Knox has not even been sentenced for the conspiracy

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[5] Knox contends that his CCE conviction should also be vacated because evidence introduced to prove Knox's participation in the conspiracy was irrelevant to Knox's engagement in the CCE and was extremely prejudicial to Knox. This contention is absurd. Evidence relevant to proving Knox's participation in the conspiracy clearly is relevant to proving Knox's engagement in the CCE because the conspiracy, as a lesser included offense of the CCE, comprises the same enterprise as the CCE. *See United States v. Fields*, 72 F.3d 1200, 1209-10 (5th Cir.), *cert. denied*, 117 S.Ct. 48 (1996).

conviction. Clearly, the conspiracy conviction did not affect Knox's sentence for the CCE conviction.

III. EVIDENTIARY ISSUES

"Evaluating the admissibility of evidence is a matter within the sound discretion of the district court." *United States v. Sparks*, 2 F.3d 574, 582 (5th Cir. 1993). Accordingly, when a defendant properly objects to the admission of evidence, the district court's decision to admit such evidence is reviewed for an abuse of discretion. *See, e.g., United States v. Bermea*, 30 F.3d 1539, 1574 (5th Cir. 1994); *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 272 (5th Cir. 1991).

A. Knox's Possession of Firearms

Knox contends that the district court abused its discretion in allowing the government to introduce evidence that he possessed firearms. This Circuit has explicitly "recognized that firearms are 'tools of the trade' of those engaged in illegal drug activities and are highly probative in proving criminal intent." *United States v. Martinez*, 808 F.2d 1050, 1057 (5th Cir. 1987); *see also United States v. Beverly*, 921 F.2d 559, 562 (5th Cir. 1991) ("[t]here is also no doubt that firearms are drug traffickers' tools of trade"). Accordingly, we find that the district court did not abuse its discretion in admitting this evidence.

B. Exhibit 26 – Bag of Crack Cocaine

Knox also contends that the district court abused its discretion in admitting a bag of crack cocaine – exhibit 26

– because the government failed to establish the chain of custody with respect to the bag. Two government witnesses, Captain Eddie McCullough and Agent Jeff Palmer, each testified that they delivered the bag of cocaine directly to the crime lab. Palmer testified that McCullough delivered the bag directly to Palmer, and that McCullough was mistaken when he testified that he delivered the bag directly to the crime lab. Knox contends that this contradictory testimony renders the bag of cocaine inadmissible. We disagree.

As this Circuit has explained, a "break in the chain of custody simply goes to the weight of the evidence, not its admissibility." *Sparks*, 2 F.3d at 582; *see also Bermea*, 30 F.3d at 1574. Accordingly, even if the apparent contradiction between Palmer's and McCullough's testimonies supports an inference of a break in the chain of custody – a proposition we doubt – the district court did not abuse its discretion in admitting the bag of cocaine.[6]

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[6] Knox also argues that the district court abused its discretion by admitting exhibit 32 – a different bag of cocaine confiscated from Knox – because of a break in the chain of custody. Knox relies on the admission by two witnesses in the chain of custody that they never initialed the bag of cocaine and thus could not be one hundred percent positive that the substance in the bag was, in fact, the substance confiscated from Knox. Each witness did, however, testify from whom they received the bag and to whom they provided the bag, and established their respective links in the chain of custody. Accordingly, the lack of initials does not render the bag of cocaine inadmissible. *See United States v. Sparks*, 2 F.3d 574, 581-82 (5th Cir. 1993) (district court did not abuse discretion by admitting into evidence two bottles of crack despite officer's testimony that he never initialed the bottles).

C. Exhibit 31 – Tire Town, Inc.'s Business Records

Both Knox and Dixon contend that the district court abused its discretion in admitting pager-rental records of Tire Town, Inc. During cross-examination, Tire Town's owner conceded that he did not personally create the records and that he did not personally know whether the records were true or accurate. Tire Town's owner did, however, substantiate that the records were business records within the definition of Federal Rule of Evidence 803(6) and testified that he relied on the accuracy of these records in the ordinary course of business. This Court has held that

> [a]ny person in a position to attest to the authenticity of certain records is competent to lay the foundation for the admissibility of the records; he need not have been the preparer of the record, nor must he personally attest to the accuracy of the information contained in the records.

Rosenberg v. Collins, 624 F.2d 659, 665 (5th Cir. 1980). Accordingly, the district court did not abuse its discretion in admitting Tire Town's business records. *See Bermea*, 30 F.3d at 1574 (holding that the district court not abuse its discretion by admitting records under Fed. R. Evid. 803(6) even though the custodian of records admitted "that she did not know whether the records had been maintained in their original form or altered in any way"); *Wilson*, 939 F.2d at 272 (holding that the district court did not abuse its discretion by admitting records under Fed. R. Evid. 803(6) despite the custodian of records's failure to testify that the records were accurate).

D. Tape Recorded Conversations Between Knox and Myrtle Bennett

Both Knox and Dixon contend that the district court abused its discretion in admitting tape recordings made of telephone calls between Knox and Myrtle Bennett, a previously cooperative government informant, while arranging a controlled drug sale. Appellants argue that the tape recorded conversations are inadmissible hearsay and, because Bennett refused to testify during trial, that the district court's admission of the tape recordings violated their Sixth Amendment right to confront Bennett. We disagree.

We first point out that neither Knox's nor Bennett's recorded statements are inadmissible hearsay. Knox's recorded statements are not hearsay because they constitute party admissions under Federal Rule of Evidence 801(d)(2)(A). *See United States v. Cheramie*, 51 F.3d 538, 541 (5th Cir. 1995); *United States v. Gutierrez-Chavez*, 842 F.2d 77, 81 (5th Cir. 1988). Bennett's recorded statements, rather than offered to prove their truth, are admissible to prove that they were uttered, and thus do not constitute hearsay.[7] *See Gutierrez-Chavez*, 842 F.2d at 81.

With respect to appellants' Sixth Amendment concerns, this Court recently held that tape recordings made

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[7] Even if Bennett's recorded statements are hearsay, they are admissible to put Knox's statements into context. *See United States v. Cheramie*, 51 F.3d 538, 541 (5th Cir. 1995); *United States v. Gutierrez-Chavez*, 842 F.2d 77, 81 (5th Cir. 1988).

of conversations between an unavailable informant[8] and a defendant are admissible and do not violate the Sixth Amendment confrontation clause if the tapes are supported by adequate indicia of reliability. *See Cheramie*, 51 F.3d at 540-41; *Gutierrez-Chavez*, 842 F.2d at 81. In this case, the government provided adequate indicia of each recording's reliability. First, Agent Rod Waller was present while the conversations between Bennett and Knox occurred. Second, Waller was the person who dialed Knox's phone number for each recorded phone call. Third, Waller testified that each recording contained the same statements that Bennett asserted during the respective telephone conversations. Fourth, Waller identified Knox's voice as the voice engaging in dialogue with Bennett during the recorded telephone conversations. Fifth, a controlled drug deal occurred in accordance with instructions provided by Knox to Bennett during one of the recorded phone conversations. Under these circumstances, we hold that the recordings are supported by adequate indicia of reliability, see Cheramie, 51 F.3d at 541 (listing factors supporting a finding of adequate indicia of reliability), and that the district court did not abuse its discretion in admitting the tapes into evidence.

E. Drug Sale and Tape Recorded Conversation Between Dixon and Dennis Roberson

Dixon also contends that the district court abused its discretion in admitting evidence of a drug sale between

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[8] Because Bennett refused to testify on the basis of the Fifth Amendment, she became "unavailable" within the definition of Federal Rule of Evidence 804(a).

Dixon and Dennis Roberson, a government confidential informant, and in admitting a tape recording of the conversation between Dixon and Roberson during the drug sale. Dixon argues on appeal that the government failed to prove that the drug sale was relevant to his participation in the drug conspiracy, and thus inadmissible, and that the tape recording constitutes inadmissible hearsay. We disagree.

Whether Dixon's sale of drugs to Roberson was an act in furtherance of the conspiracy charged in the indictment, rather than an independent drug sale, is a question of fact for the jury. *See United States v. Morgan*, 117 F.3d 849, 858 (5th Cir.) (holding that "[w]hether the evidence shows one or multiple conspiracies is a question of fact for the jury"), *cert. denied*, 66 U.S.L.W. 3355 (U.S. Nov. 17, 1997) (No. 97-6370). The district court did not abuse its discretion in admitting evidence of Dixon's drug sale to Roberson.

With respect to the tape recording's admissibility, Dixon's recorded statements are admissible as a party admission under Federal Rule of Evidence 801(d)(2)(A), and Roberson's recorded statements, even if considered hearsay, are admissible to put Dixon's statements into context. *See Cheramie*, 51 F.3d at 541; *Gutierrez-Chavez*, 842 F.2d at 81. Accordingly, the district court did not abuse its discretion by admitting the tape recording.

IV. APPELLANTS' *BRADY* CLAIM

Knox and Dixon both contend that the government violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to produce Knox's financial records and car titles, which

the government seized while executing a search warrant. Knox argues that such evidence would have helped him contest the government's allegation that Knox derived substantial income from the sale of drugs, which is an essential element of his CCE conviction. Dixon argues that such evidence would have demonstrated his legitimate ownership of a Suzuki Samurai Sidekick and that he would thus be exonerated.

This Court reviews the district court's *Brady* determination de novo. *See United States v. Green*, 46 F.3d 461, 464 (5th Cir. 1995). To establish a due process violation under *Brady*, a defendant must show that: (1) evidence was suppressed; (2) the suppressed evidence was favorable to the defense; and (3) the suppressed evidence was material either to guilt or to punishment. *See Brady*, 373 U.S. at 67; *United States v. Aubin*, 87 F.3d 141, 148 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 965 (1997). However, *Brady* does not obligate the government "to produce for [a defendant] evidence or information already known to him, or that he could have obtained from other sources by exercising reasonable diligence." *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir.), *cert. denied*, 117 S.Ct. 1489 (1997). Accordingly, to prevail in their *Brady* claim, Knox and Dixon must show that the allegedly suppressed information was not available to them through due diligence. *See Aubin*, 87 F.3d at 149.

Neither Knox nor Dixon has demonstrated that the information contained in Knox's financial records and car titles was not available to him through his own due

diligence.[9] Knox asserts that the seized evidence contained information about the income he received from buying and selling used cars. This is information about which Knox should have known, and Knox has not shown that this information was not available to him through due diligence. Dixon asserts that the suppressed evidence contained information about his ownership of the Suzuki. As with Knox, this is information about which Dixon should have known, and Dixon has not shown that this information was not available to him through due diligence. Accordingly, the government did not violate *Brady*.

V. SUFFICIENCY OF THE EVIDENCE

When reviewing a claim for insufficiency of the evidence, this Court must determine whether, based on the totality of the evidence presented at trial, a rational jury could have found that the government proved the essential elements of the crimes charged beyond a reasonable doubt. *See United States v. Davis*, 61 F.3d 291, 296 (5th Cir. 1995). While making this determination, this Court must consider the evidence in the light most favorable to the government, including all reasonable inferences that may be drawn therefrom. *See United States v. Bermea*, 30 F.3d 1539, 1551 (5th Cir. 1994).

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[9] Neither Knox nor Dixon even argues that he could not have obtained the information through his own due diligence.

A. The CCE Conviction

Knox challenges the sufficiency of the evidence to support his CCE conviction. A person engages in a CCE if:

> (1) he violates any provision of [title 21] the punishment for which is a felony, and
>
> (2) such violation is part of a continuing series of violations of [title 21] –
>
> > (A) which are undertaken by such persons in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
> >
> > (B) from which such person obtains substantial income or resources.

21 U.S.C. § 848(c).

The testimony at trial established that Knox was the leader of a large crack and powder cocaine distribution conspiracy that operated between 1992 and 1995, employed more than five people at any given time, and made significant sums of money from the conspiracy. While much of the testimony implicating Knox was from coconspirators who accepted plea bargains from the government, "Cut is well-settled that credibility determinations are the sole province of the jury." *Davis*, 61 F.3d at 297. Indeed, " '[a] conviction may rest solely on the uncorroborated testimony of one accomplice if the testimony is not insubstantial on its face.' " *Id.* (quoting *United States v. Gibson*, 55 F.3d 173, 181 (5th Cir. 1995)). In this case, each of the witnesses testified to numerous

drug runs and drug deals. Moreover, much of the testimony was corroborated by undercover agents, government informants, and taped telephone conversations. The bountiful evidence describing Knox's role in the conspiracy and the substantial income he derived therefrom was sufficient to support his CCE conviction.

B. Use of a Communication Facility

Knox also challenges the sufficiency of the evidence to support two of his convictions under 21 U.S.C. § 843(b) for using a communication facility to facilitate the attempted distribution of cocaine. Knox contends that his convictions under counts twenty-two and twenty-three are improper because no drug transactions occurred as a result of either of the predicate act telephone calls. We disagree.

To secure a conviction under 21 U.S.C. § 843(b), the government must establish that the defendant knowingly and intentionally used a telephone to facilitate the commission of a narcotics offense. *See United States v. Gonzalez-Rodriguez*, 966 F.2d 918, 921 (5th Cir. 1992).

> In order to establish the facilitation element, the Government must show that the telephone call comes within the common meaning of facilitate – to make easier or less difficult, or to assist or aid. It is sufficient if a defendant's use of a telephone to facilitate the possession or distribution of controlled substances facilitates either his own or another person's possession or distribution.

Id. (quotations and citations omitted). Because counts twenty-two and twenty-three of the indictment specifically charge Knox with using a communication facility to facilitate the "attempted distribution" of cocaine, the government only is required to establish that Knox used the telephone to facilitate an attempt to distribute drugs. *See United States v. Ray*, 641 F.2d 222, 224 n.6 (5th Cir. Unit A Mar. 1981) ("[w]hen the underlying offense is an inchoate one such as attempt or conspiracy, then the attempt or conspiracy is all that must be shown . . . , and it is not necessary to show completion of the objective of that inchoate crime").

In this case, we conclude that the evidence is sufficient to support Knox's convictions under both counts twenty-two and twenty-three. During the first telephone call on February 10, 1995 (count twenty-two), Wanda Henry, a government witness, asked Knox to sell her some drugs. To complete the sale, Knox directed Henry to meet him at a store at which he sold her drugs on the previous day. Knox subsequently met Henry at the store, but did not sell her any drugs. Rather, and because he was concerned that he was being followed, Knox directed Henry to page him twenty minutes after leaving the store. Henry subsequently left the store and paged Knox approximately twenty minutes later. Knox responded to the page (count twenty-three) and directed Henry to meet him at a Wal-Mart to complete the sale. Knox, however, never showed up at the Wal-Mart. This evidence is sufficient for a reasonable jury to determine that Knox twice attempted to sell drugs to Henry, and that Knox used the telephone to facilitate each attempt.

C. The Drug Conspiracy Conviction

Dixon challenges the sufficiency of the evidence to support his drug conspiracy conviction. To support a drug conspiracy conviction, the government must establish "(1) the existence of an agreement between two or more persons to violate narcotics law; (2) the defendant's knowledge of the agreement; and (3) the defendant's voluntary participation in the agreement." *United States v. Gonzalez*, 76 F.3d 1339, 1346 (5th Cir. 1996). "A jury may infer the elements of a conspiracy conviction from circumstantial evidence: An agreement to violate narcotics laws may be inferred from concert of action. Knowledge of the conspiracy may be inferred from a collection of circumstances." *United States v. Leal*, 74 F.3d 600, 606 (5th Cir. 1996) (quotations and citations omitted). In addition, "[a]lthough mere presence at the scene of the crime or close association with a coconspirator will not support an inference of participation in a conspiracy, a defendant's voluntary participation may be inferred from a development and a collocation of circumstances." *United States v. Vergara*, 687 F.2d 57, 61 (5th Cir. 1982) (quotations and citations omitted).

In this case, there is abundant evidence supporting the existence of a drug conspiracy. The case also teems with evidence showing that Dixon knew of and voluntarily participated in the conspiracy. Several witnesses[10]

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[10] Dixon argues that many of the witnesses who testified against him were coconspirators who received plea bargains, whose testimony was not credible, and some of whose testimony was not corroborated by non-coconspirators. As explained above, however, "Cut is well-settled that credibility

testified that Dixon worked in Knox's organization, buying, delivering, and selling crack and powder cocaine. For example, Scott Riddle, one of Knox's cousins and drug sellers, testified that Dixon sold crack cocaine at Knox's house and that Dixon made trips to pick up cocaine for Knox. Rhonda Simmons, a coconspirator, testified that Dixon delivered crack cocaine for Knox. James Rutherford testified that he had dealt with Dixon when purchasing crack cocaine at Knox's house. Virginia Cowan testified that she bought crack cocaine from Dixon at Knox's house. Diane Graham, whose husband bought and sold drugs for Knox, testified that Dixon worked for Knox. In addition, Knox provided a pager to Dixon, and Dixon's license plate was affixed to Knox's car when two of Knox's drug runners were arrested. Furthermore, Dixon traveled with Knox on at least one occasion to Mississippi to pick up several ounces of cocaine. This evidence is sufficient to support Dixon's conspiracy conviction.

VI. SENTENCING ISSUES

Knox and Dixon appeal the sentences imposed by the district court under the United States Sentencing Guidelines. This Court reviews the district court's application of the Sentencing Guidelines de novo and the district

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determinations are the sole province of the jury." *United States v. Davis*, 61 F.3d 291, 297 (5th Cir. 1995). Accordingly, "non-credibility is generally not a sound basis for alleging insufficiency of the evidence; it is the jury's function to determine credibility." *United States v. Payne*, 99 F.3d 1273, 1278 (5th Cir. 1996) (quotations and citations omitted).

court's factual findings for clear error. *See United States v. West*, 58 F.3d 133, 137 (5th Cir. 1995). "A factual finding is not clearly erroneous as long as it is plausible in light of the record as a whole." *United States v. Thomas*, 12 F.3d 1350, 1366 (5th Cir. 1994) (quotations and citations omitted).

A. Firearm Enhancement

Knox and Dixon both contend that the district court's two-level enhancement for possession or use of a dangerous weapon, under U.S.S.G. § 2D1.1(b)(1), was clearly erroneous. The enhancement is appropriate if a firearm "was possessed during the course of manufacturing, importing, exporting, or trafficking in narcotics, including attempting or conspiring to do so." *United States v. Gaytan*, 74 F.3d 545, 559 (5th Cir.), *cert. denied*, 117 S.Ct. 77, and *cert. denied*, 117 S.Ct. 506 (1996). The district court's decision to enhance the sentence level for firearms is a factual determination reviewed for clear error, *see United States v. Brown*, 985 F.2d 766, 769 (5th Cir. 1993), and may be supported by "any relevant evidence that has sufficient indicia of reliability to support its probable accuracy." *United States v. Buchanan*, 70 F.3d 818, 828 (5th Cir. 1995) (quotations and citations omitted). However, the applicability of the enhancement must be proved by a preponderance of the evidence. *United States v. Devine*, 934 F.2d 1325, 1339 (5th Cir. 1991).

In this case, the evidence clearly indicates that Knox possessed firearms during the course of the CCE. Virginia Crum, Knox's former girlfriend, testified that Knox traveled to Memphis two to three times each week to pick up

cocaine and that Knox carried a gun on nearly every trip. In addition, both Larry Cox, one of Knox's coconspirators, and Diane Graham, the wife of one of Knox's coconspirators, testified that guns were kept at Knox's house. Furthermore, Mike Edlemon, a government investigator, testified that he saw firearms carried by Knox's coconspirators while they were selling drugs to customers in Knox's driveway.

The evidence also clearly indicates that the district court did not err in enhancing Dixon's sentence under U.S.S.G. § 2D1.1(b)(1). A defendant's sentence may properly be enhanced under U.S.S.G. § 2D1.1(b)(1) if the possession of a firearm by one of his coconspirators was reasonably foreseeable. *See Gaytan*, 74 F.3d at 559. This Court has explained that "[o]rdinarily, one coconspirator's use of a firearm will be foreseeable because firearms are 'tools of the trade' in drug conspiracies." *United States v. Mergerson*, 4 F.3d 337, 350 (5th Cir. 1993) (citation omitted). In this case, the evidence demonstrates that Dixon distributed drugs at Knox's house, and that firearms were kept and carried in Knox's house in connection with drug activities. In addition, Dixon traveled to Memphis with Knox on at least one occasion to pick up drugs, and Knox carried firearms on nearly every trip to Memphis.

B. Constitutionality of 21 U.S.C. § 860(a)

Knox argues that 21 U.S.C. § 860(a) is an unconstitutional extension of Congress's regulatory powers under the Commerce Clause, and that his convictions under § 860(a) should thus be vacated. This Court, however, has

already rejected this argument. *See United States v. Clark*, 67 F.3d 1154, 1165-66 (5th Cir. 1995), *vacated in part on other grounds sub nom. Coffman v. United States*, 117 S.Ct. 40 (1996); *see also United States v. Allen*, 106 F.3d 695, 701 (6th Cir.) (agreeing with Clark that 21 U.S.C. § 860 is within Congress's commerce power), *cert. denied*, 117 S.Ct. 2467 (1997); *United States v. Lopez*, 2 F.3d 1342, 1366 n.50 (5th Cir. 1993) (indicating that 21 U.S.C. § 860 is based on the "federal authority over intrastate as well as interstate narcotics trafficking"), *aff'd*, 514 U.S. 549 (1995).

VII. OTHER ISSUES

Knox and Dixon raise numerous other issues in this appeal. Knox contends that the district court erred by (1) quashing his subpoena to Probation Officer Darrell Doss, (2) limiting his cross-examination of Barry Cook and Barry Cox, (3) seating Peggy Dudley as a juror, (4) refusing to give one of Knox's proposed jury instructions, (5) merging jury instructions for different counts of the indictment, (6) refusing to grant a mistrial because Myrtle Bennett pleaded the Fifth Amendment while on the witness stand, (7) refusing to grant a mistrial because of the government's introduction of improper and prejudicial evidence, (8) refusing to grant Knox's motion for a new trial, (9) refusing to grant Knox's motion to suppress evidence concerning his possession of firearms, (10) admitting various testimony, (11) refusing to require the government to identify a non-testifying confidential informant, (12) attributing 15.65 kilograms of crack cocaine to Knox for sentencing purposes, and (13) refusing to find that Knox was subject to sentencing entrapment for selling drugs within 1000 feet of a high school.

Dixon incorporates each of Knox's allegations of error by reference and further contends that the district court erred by (1) refusing to grant Dixon's motion for a new trial, (2) refusing to give Dixon's proposed jury instructions, (3) limiting Dixon's objections, (4) attributing 11.79 kilograms of crack cocaine to Dixon for sentencing purposes, (5) refusing to grant Dixon a downward departure as a minimal or minor participant, (6) refusing to grant Dixon a downward departure because his coconspirators, who cooperated with the government, received lighter sentences, (7) refusing to reduce Dixon's offense level based on Dixon's acceptance of responsibility, and (8) refusing to hold that the disparity between sentences for crack cocaine and powder cocaine is unconstitutional. After carefully reviewing the record, we determine that each of the arguments is meritless under the established law of this Circuit and does not require discussion. *See United States v. Allen*, 76 F.3d 1348, 1357 (5th Cir.) (summarily affirming district court and refusing to discuss meritless arguments), *cert. denied*, 117 S.Ct. 121 (1996).

VIII. CONCLUSION

For the foregoing reasons, we VACATE Stanley Knox's conviction on count one (conspiracy), and AFFIRM the district court in all other respects.

VACATED IN PART AND AFFIRMED IN PART.

APPENDIX B

United States District Court
NORTHERN DISTRICT OF MISSISSIPPI

UNITED STATES OF AMERICA	VERDICT
V.	CASE NUMBER: 3:95CR072-B
DWIGHT DIXON	(Filed Jan. 30, 1996)

WE THE JURY, FIND: the defendant DWIGHT DIXON, as to the Indictment in the above captioned cause:

Count 1: Guilty

PLEASE WRITE GUILTY OR NOT GUILTY AS APPROPRIATE

/s/ Keith Hudspeth — FOREPERSON'S SIGNATURE

1-29-96 — DATE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

CRIMINAL MINUTES – JURY TRIAL

(Filed Jan. 30, 1996)

Case No. 3:95CR072-B Place Held OXFORD

UNITED STATES OF AMERICA v. STANLEY KNOX and DWIGHT DIXON

Date & Time Began 01/22/96 @ 10:00
Date & Time Ended 01/29/96 @ 11:00

Total Time 6 days

Present:

Honorable NEAL B. BIGGERS, JR., Judge

Leroy Wadlington
Nancy Smith
Deputy Clerk

Marilyn Hinman
Court Reporter

ATTORNEY PRESENT FOR GOVT.
Charles W. Spillers
William C. Lamar
Asst. U.S. Attorneys

ATTORNEY PRESENT FOR DEFT.
Anthony Farese, Ashland
Bobby T. Vance, Batesville

Verdict Returned 5:23 PM Deliberation Began 4:55 PM

Exhibits Introduced Yes Deliberation Ended 5:17 PM

VERDICT: of Guilty on both defendants on remaining Counts

Other Remarks: (1) Gov't motion to dism Cts. 3-6, 14-15, GRANTED by court and ordered entered. (2) Sensitive

exhibits returned to DEA as shown on receipt for exhibits.

NORMAN L. GILLESPIE, CLERK
By:

/s/ Leroy Wadlington
Courtroom Deputy Clerk

United States District Court
Northern District of Mississippi

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	(For Offenses Committed On or After November 1, 1987)
DWIGHT DIXON	(Filed Apr. 17, 1996)
	Case Number: 3:95CR00072-004
	Bobby T. Vance Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[X] was found guilty on count(s) 1 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	Conspiracy to Distribute and to Possess with Intent to Distribute Cocaine Base	03/01/1995	1

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 425-59-2038

Defendant's Date of Birth: 07/25/1972

Defendant's USM No.: 10315-042

04/12/1996
Date of Impression of Judgement

Defendant's Residence Address:

c/o Willie B & Viola Harris
Route 3, Box 394
New Albany MS 38652

Defendant's Mailing Address:

c/o U.S. Marshal Service
Lafayette County Detention Center
Oxford MS 38655

J/C BK No. 42 228-235

/s/ Neal B. Biggers, Jr.
Signature of Judicial Officer

Neal B. Biggers, Jr.
U.S. District Judge

Name & Title of Judicial Officer

4/16/96
Date

Entered 4/17/96

APPENDIX C

CONSTITUTIONAL PROVISIONS

[AMENDMENT V]

[*Due Process and Equal Protection*]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[AMENDMENT VI]

[*Fundamentally Fair Trial*]
[*Confrontation Clause*]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence [sic].

STATUTORY PROVISIONS

21 USC Section 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment of fine both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

28 USC Section 2103. Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari

If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs.

28 USC 2105. Scope of review; abatement

There shall be no reversal in the Supreme Court or a court of appeals for error in ruling upon matters in abatement which do not involve jurisdiction.

28 USC 2106. Determination

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.